UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case Nos. 18-2220 and 18-2619

CORAL HARBOR REHABILITATION AND NURSING CENTER,
Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Cross-Petitioner.

PETITION FOR REHEARING EN BANC

PETITION FOR REVIEW FROM THE DECISION OF THE
NATIONAL LABOR RELATIONS BOARD
AT CASE 22-CA-167738 FINDING THAT NURSES DID NOT QUALIFY AS
STATUTORY SUPERVISORS UNDER THE NLRA
AND
CROSS-PETITION FOR ENFORCEMENT OF THE BOARD'S ORDER

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Petitioner, Coral Harbor Rehabilitation and Nursing Center, by its attorneys, Capozzi Adler, P.C. ("Coral Harbor"), petitions for rehearing en banc pursuant to FED. R. APP. P. 35.

INTRODUCTION

The definition and application of "Supervisor" in the National Labor Relations Act (NLRA), 29 U.S.C. § 152(11), has been a continuing work in progress for both the National Labor Relations Board (NLRB) and Federal Courts. *See: Nat'l Labor Relations Bd. v. New Vista Nursing & Rehab.*, 870 F.3d 113, 129-32 (3d Cir. 2017), *dismissed after remand and withdrawal of underlying charge* (Mar. 22, 2019) ("*New Vista*").

This Court's decisions in *New Vista* and *N.L.R.B. v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999) ("*Attleboro*"), recently have been chosen by the NLRB to guide its reconsideration of extant Board law on when nurses "effectively recommend discipline" to qualify as statutory supervisors. *Mountain View Health Care & Rehab. Ctr., LLC Employer & Retail Wholesale & Dep't Store Union (RWDSU) Petitioner*, No. 04-RC-242288, 2019 WL 7584387, at *1 (Dec. 11, 2019) ("*Mountain View*"). *New Vista* recognized, 870 F.3d at 135 n.14 (last sentence), that the definition of "effectively to recommend discipline," in the statutory definition of Supervisor was the key issue in that case. It is also the key

issue in this one. The NLRB's selection of *New Vista* suggests that *New Vista* supports changes to extant Board law.

The Panel's decision in this case, 945 F.3d 763 (3d Cir. 2019, as amended Jan. 6, 2020) ("Panel Decision") determined that the NLRB's underlying decision was supported by the record and the tests established by *New Vista*. Coral Harbor submits the Panel Decision misapplied determining factors in *New Vista*, 870 F.3d at 130-34, including using those listed at 870 F.3d at 134 n.13 as "largely inapplicable to the correct test," and thereby failed to consider evidence establishing supervisor status and to conflate factors for imposing discipline with those for effectively recommending discipline. *See: Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951) (Standard of review does not permit ignoring or misconstruing evidence that detracts from NLRB findings).

As a result, the Panel Decision has the same problem that required remand in *New Vista*, 870 F.3d at 134: misconstruing the record through the lens of an incorrect legal standard. When *New Vista* is applied through its broader lens of factors and also factoring in the short start up period involved here, to consider the evidence not discussed by the Panel, supports the statutory supervisor status of Coral Harbor's nurses.

The Panel Decision also does not address the "industrial practicality" standard recognized by the NLRB itself in *Progressive Transportations Servs.*,

Inc., 340 NLRB 1044, 1045-1046 (2003) ("*Progressive*") (cited in Petitioner's Briefs) that focuses on real world management needs for flexibility in dealing with employees to achieve the proper balance between management and labor. *Progressive* was applied to reverse the NLRB and find statutory supervisor status for nurses effectively recommending discipline in *Nat'l Labor Relations Bd. v. Lakepointe Senior Care & Rehab. Ctr., LLC*, 680 Fed.Appx. 400 (6th Cir. 2017) ("*Lakepointe*") and *GGNSC Springfield LLC v. N.L.R.B.*, 721 F.3d 403 (6th Cir. 2013) ("*GGNSC*") (both cited in Petitioner's Briefs). These decisions were not addressed in the Panel Decision, in the NLRB's decision below, 366 NLRB No. 75 (2018), or in *New Vista*.

Petitioner requests this Court en banc to rehear this case to define and apply "effectively recommends discipline," the key issue in *New Vista*, to the facts of this case, reflecting all of these factors; and, thereby to provide the Board with clarified direction and guidance for its future reformulation of extant Board law.

STATEMENT OF COUNSEL

Pursuant to FED. R. APP. P. 35(b)(1) and 3d Cir. L.A.R. 35.1, undersigned counsel hereby states:

I express a belief, based on a reasoned and studied professional judgment, that the Panel Decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and

that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, i.e., the Panel's Decision is contrary to the decision of this Court or the Supreme Court in *New Vista* and *Attleboro* (discussed and applied in *New Vista*); OR, that this appeal involves a question of exceptional importance, i.e., since the Panel's Decision as to the definition and application of "effectively recommend discipline" for qualification as a Supervisor under the National Labor Relations Act conflicts with decisions of the Sixth Circuit (*Lakepointe* and *GGNSC*); and, since the National Labor Relations Board (NLRB) stated on Dec. 11, 2019, in *Mountain View*, citing *New Vista* and *Attleboro*: "We note, however, that the concerns articulated by the Third Circuit regarding the Board's test for whether putative supervisors may effectively recommend discipline warrant careful consideration, and we would be open to reconsidering the extant Board law on this topic in a future appropriate case."

A copy of the Panel's judgment, order and opinion is attached pursuant to 3d Cir. L.A.R. 35.2.

ARGUMENT

I. The Panel applied factors that *New Vista* held were inapplicable

In *New Vista*, 870 F.3d at 130-34, this Court specified factors to guide qualifying workers as supervisors who "effectively recommend discipline"

pursuant to 29 U.S.C.A. § 152(11), including factors that together may show statutory status, those that do not disprove it, and others that are "irrelevant" and "inapplicable to the correct test." Among those *New Vista*, at 134 n.13, deemed irrelevant and inapplicable were:

- "[D]iscipline issued to a CNA is investigated by unit managers or upper management."
- "LPNs rarely if ever checkmark the penalty level of discipline because they do not have access to employees' personnel files and do not know where the employee stands in the progressive disciplinary scheme."
- "LPNs are not told "the outcome of a disciplinary matter" and do not attend meetings where the "discipline is served."
- "The DON or other upper management officials make all the final disciplinary decisions"

The Panel Decision here, in determining whether the NLRB's findings were supported by the record, applied factors that were deemed inapplicable and irrelevant in *New Vista*. Specifically, the Panel cited as a reason the LPNs were not supervisors:

(1) ". . . because LPNs lacked access to CNA personnel files, they could not determine appropriate levels of discipline": Panel Decision at 771-772.

The Panel Decision used this irrelevant factor to agree with the NLRB's conclusion that the LPNs lacked the independent judgment required to qualify and

to conclude that this inapplicable factor undercut meeting *New Vista*'s "initiate a progressive disciplinary process."

(2) ". . . because they did not fill out the level or type of discipline on the disciplinary notices" leaving that to be signed off and imposed by the DON: Panel Decision at 770.

The Panel used this irrelevant factor to conclude that LPNs were not "responsible for administering discipline to the extent required for supervisor status under the NLRA." The Panel Decision does not explain how this is relevant to supervisor status based on effectively recommending discipline, in which cases the imposition and level of discipline is determined by others. *See: Lakepointe,* 680 Fed.Appx. at 403, *citing GGNSC* and *Progressive* ("nurse need not specify the level of discipline to be a supervisor"; "supervisor recommends discipline even when her supervisor instructs her as to the level of discipline and advises her on the wording of the notice.").

(3) The Panel Decision at 766, after recognizing that LPN4 had "issued three disciplinary notices without instruction or consultation and made formal recommendations," "because the subsequent discipline was handled by the unit manager."

This is plainly contrary to the plain meaning of effectively recommend discipline and *New Vista.* The Panel's suggestion that supervisor status cannot be supported where the supervisor "had not observed" the infraction is not supported by *New Vista* or the NLRB. The Panel used these irrelevant factors to overlook evidence in the record, contrary to the review standard in *Universal Camera Corp.*

v. N.L.R.B., 340 U.S. at 488, that established not only "effectively recommending discipline" (JA000669-000670) but also that such disciplines (JA000663) later formed a basis, under Coral Harbor's progressive discipline policies (JA01211-01212, 01214-01220) for more severe consequences (suspension) (JA01317) after later violations, thereby meeting all *New Vista* requirements.

The Panel Decision's conclusions, at 771-772, that: "Nowhere in the Center's brief does it offer an explanation of how any of its disciplinary actions follow a progressive discipline policy" and "Nowhere does the record establish that a subsequent infraction increased the severity of discipline after an LPN was involved in issuing a prior discipline" are the incorrect results of the Panel's incorrect path. *See also:* Coral Harbor's Opening Brief at 20-21, 41 and Reply Brief at 10, discussing LPN4's testimony and such a progressive discipline sequence.

> (4) That LPN3 would initiate the discplinary process by getting the form from the DON and consult with the DON before issuing the discipline, with the level of discipline being determined by the DON. Panel Decision at 766.

The Panel Decision used this inapplicable factor to overlook evidence in the record that:

1) LPN3 was "recommending discipline" (JA000433, ll. 18-21: LPN3 went to the DON to let her know LPN3 was issuing discipline; JA000433-000434,

ll. 25-1: every time LPN3 feels like she has to write someone up, she goes to the Unit Manager or a DON); and,

2) Such recommendations were routinely accepted and put in the personnel files by the DON (JA000434, ll. 8-9).

When LPN3 goes to DON with such recommendations, DON tells her to do the write up; JA00062, ll. 6-9 and 000652, ll. 14-15: (DON never changes LPN decisions to issue disciplines and puts the resulting disciplines into the personnel files).

The Panel also chose to overlook LPN3's testimony in response to the ALJ (JA000469, ll. 5-7) that she can issue discipline without checking with anyone else, but "likes to ask"; testimony that she wrote up several disciplines without input from others (JA000433, ll. 5-22); and, testimony that she exercised independent judgment not to discipline nurse aides, even after suggestions from the Administrator to send them home (JA000459-000461, especially 000460-000461, ll. 24-2 (LPN3 made the decision not to discipline the aides).

Such evidence supported supervisor status in *New Vista* at 132, citing *Attleboro* at 165; and in the Sixth Circuit decisions. Both *GGNSC* at 412 and the NLRB, *Concourse Vill., Inc.*, 276 NLRB 12, 13 (1985), also found that supervisory status is not negated where workers issue some warnings independently but others

pursuant to a supervisor's directive. *New Vista*, 870 F.3d at 132, held that one exercise of supervisory authority is sufficient to establish status as a supervisor.

II. The Panel's interpretation of *New Vista* is inconsistent with industrial practicality standards applied by the Board and the Sixth Circuit

In *Progressive*, 366 NLRB at 1045-1046, the NLRB adopted industrial practicality standards that integrate management's need for flexibility with employee discipline with its statutory supervisor standard that progressive discipline systems have the real potential to impact employment, finding: (a) the argument that authority as to discipline is supervisory only when it automatically leads to an action affecting employment does not comport with industrial practicality under which the imposition of discipline can be supervisory without a rigid and inflexible system under which discipline always leads to a precise impact on employment, as long as it has the real potential to lead to an impact on employment); and, (b) a supervisor recommends discipline even when her supervisor instructs her as to the level of discipline and the wording of the discipline notice. The Sixth Circuit applied these standards to reverse the NLRB and qualify such nurses as statutory supervisors. *Lakepointe* at 403-404; *GGNSC*, at 410-411.

The Sixth Circuit, *GGNSC* at 410, like *New Vista* at 132, found that "discipline" as used in the NLRA must mean something different than "lay off",

"suspend" or "discharge" to avoid surplusage. The Sixth Circuit, *GGNSC* at 410-411, citing *Progressive*, rejected the NLRB's position that such discipline must automatically lead to an action affecting employment.

This would be consistent with *New Vista* at 132, in which this Court, citing *Attleboro* at 165, required only that such write ups become a permanent part of the personnel file that could lead to termination; although, *New Vista* rephrased this part of its test as: the write up "functions like discipline because it increases severity of the consequences of a future rule violation." This Court did not indicate in *New Vista* an intention to change what *Attleboro* required or to deprive management of the flexibility present in the employee manual in this case or in any others.

The Panel Decision at 772, however, by focusing on the severity language in *New Vista* to require proof of a later actual increase in severity of discipline imposed to validate having a progressive discipline system, goes beyond what *New Vista*, *Attleboro*, the Sixth Circuit and *Progressive* require. The Panel Decision fails to credit Coral Harbor's progressive discipline policy (*compare GGNSC*, 721 F.3d at 409) and the testimony of its Director of Nursing (JA000620, Tr. 387, ll. 6-9: never changed LPN decisions to issue discipline) (JA000652, ll. 14-15: "If they've given me a disciplinary action, it goes in the file") (*compare Lakepointe* at 403-404: nurses effectively recommend discipline where managers give them

substantial weight or regularly relied on them; *Attleboro*, 176 F.3d at 165: write ups become a permanent part of the personnel file). The Panel's Decision also does not address the links between one of the suspensions in the record (J01317), the recommendation for it by the LPN (JA000669-670), and its related prior violations in the progressive discipline process (JA000663), a sequence demonstrating at least one case of effectively recommending discipline and that LPN's less onerous disciplines function like discipline as required by *Attleboro* and *New Vista*.

The Panel also did not address *Progressive*'s industrial practicality standards that permit management discretion rather than automatic lockstep imposition of discipline. Healthcare facilities, after all, have to retain such discretion to balance the need to continue experienced staff in an age of significant staff shortages, *see, e.g.,* PENNSYLVANIA DEPARTMENT OF THE AUDITOR GENERAL, WHO WILL CARE FOR MOM & DAD? PREPARING FOR THE SENIOR POPULATION EXPLOSION: A SPECIAL REPORT BY AUDITOR GENERAL EUGENE DEPASQUALE (2019) (referencing Observation 6); staff morale; and different proof requirements in its collective bargaining agreement (JA000650, Tr. 417; JA000876).

III. The Panel's interpretation of *New Vista* cannot work in start-up cases such as this one

Coral Harbor submits that practicality standards must be applied to meet the requirement in *New Vista* at 135 n.14 (citing *Nat'l Cable & Telecomms. Ass'n. v.*

Brand X Internet Servs., 545 U.S. 967, 980 (2005)) that ambiguities in the definition of Supervisor must be filled in a reasonable fashion. The interpretation adopted by the panel and the NLRB is not workable or reasonable in cases such as this one where the employer has just established supervisor positions, and during the startup period, cannot provide the kinds of evidence the panel and the NLRB are requiring. Both the ALJ and the Board agreed below that the critical factual issue here is whether or not the nurses qualified as statutory supervisors when Coral Harbor changed their job descriptions under its authority as a *Burns* successor (JA000003). The Board's decision found that "the obligation to bargain with the Union turns on whether [Coral Harbor] was justified in its refusal to bargain because it had, in fact, converted the LPNs to supervisors." (JA000003); *see also:* Advice Memorandum from Barry J. Kearny, Associate General Counsel, National Labor Relations Board Office of the General Counsel, to Jonathan Kreisberg, Regional Director, Subject of Chestnut Health & Rehab., Case 01-CA-133397 (Mar. 6, 2015) (on file with the National Labor Relations Board) (confirming that a *Burns* successor may make such a conversion of job duties).

In startup situations, new supervisors will have a learning curve producing more interaction with managers about how the new process works, as demonstrated by testimony in the record (JA000360, Tr. 129: "need a little help with it because…this is something new to us"; JA000361, Tr. 130: "asked for her

to help me fill this out because I had never filled one out before"; JA000363, Tr. 132: "this is new for us"). *Progressive*, 340 NLRB at 1045 and *Lakepointe*, 680 Fed.Appx. at 403 confirm that such consultation does not negate supervisor status based on effectively recommending discipline.

In startup situations, there may be no instances of a write up becoming the basis for later discipline or termination, but the nurse nevertheless has "the authority to" and did "effectively recommend discipline" using "independent judgment" as required by the NLRA's definition at § 152(11). *New Vista* at 132 stated: "...it is clear that a nurse can be a statutory supervisor if he or she has the authority to effectively recommend less onerous discipline." *New Vista* should not be read to deny supervisor status if there are no further disciplines in the record. *See: Medicines Co. v. Mylan, Inc.*, 853 F.3d 1296, 1303 (Fed. Cir. 2017) (rejecting as unworkable interpretation requiring forward-looking fact-finding).

Since the Board agreed that there is no violation if Coral Harbor converted the nurses to statutory supervisors when it refused to bargain (JA000003), the focus of the analysis must be as of that time. The Panel's interpretation of *New Vista* as requiring actual evidence of future consequences precludes supervisor status for workers who otherwise meet the statute's requirements. *See: N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *Vance v. Ball State*

Univ., 570 U.S. 421, 434 n.7 (2013) (NLRB interpretation of definition is narrower than plain meaning permits).

Coral Harbor submits that *New Vista* and *Attleboro* support statutory supervisor status not only on this record, but also where nurses have the authority to effectively recommend less onerous levels of discipline under a progressive discipline policy and such disciplines are entered into the personnel files to have the potential under that policy to require more severe consequences for later violations, even if no later violations occur.

IV. Applying all of the *New Vista* factors to the evidence, consistent with industrial practicality principles, yields a different and reasonable result

This case, like *New Vista*, involves the requirements for statutory supervisor status based on "effectively recommends discipline". Coral Harbor preserved that issue in its Briefs. While the Panel Decision, 945 F.3d at 767, 769, acknowledges that issue is preserved, those requirements are not addressed in the Panel's Decision until the first sentence of Section III-C, at 771, addressing the application of *New Vista*: ("because her recommendation is subject to . . .").

While the Panel's review of the evidence, 945 F.3d at 767, acknowledges testimony that LPN4 "issued three disciplinary notices, without instruction or consultation and made formal recommendations," the Panel's Decision does not apply the requirements for effectively recommend discipline supervisor status to

the facts related to those recommendations. The Panel's further reference to instances when LPN4 was not acting independently are not relevant to her supervisory status since, as noted in *GGNSC* at 412 and the NLRB, *Concourse Vill., Inc.,* 276 NLRB at 13, supervisory status is not negated where workers issue some warnings independently but others pursuant to their supervisor's directive. *New Vista* at 132, held that one exercise of supervisory authority is sufficient. As a result, the Panel Decision conflates requirements to "impose discipline" for those to "effectively recommend discipline."

The Panel's Decision at 770 that the record supports the Board's conclusion that LPNs lacked independent judgment because all disciplines must be approved by others and the level of discipline determined by others is contrary with *New Vista*'s teaching for "effectively recommend discipline," at 132-34, that subsequent upper management investigation does not disprove supervisory status; that calling work rule violations to the attention of management is sufficient; and that management making the final decision is irrelevant.

LPN4's discipline evidence meets the *New Vista* tests. Neither *New Vista*, nor the NLRB require supervisors to witness the events for which they impose or recommend discipline. Both the Board's Brief at 13 and the Union's at 11 agree that the Record shows that the disciplines imposed were the result of LPN4 calling her Unit Manager's attention to violations of work rules. The Board's Brief at 14

agrees that the Record shows that LPN3 initiated a discipline issued to a CNA by letting the DON know that LPN3 would be issuing it for violating work rules related to resident smoking and confirming with DON that LPN3 could write up the CNA, then wrote it up, after which the DON determined the level of discipline. *See: New Vista* at 132 (citing *Warner Co. v. N. L. R. B.*, 365 F.2d 435 (3d Cir. 1966) as an example of meeting the test).

The Board's Brief at 13 and the Union's at 11 arguing that joint action by LPN2 and another LPN to provide training for CNAs they found performing below expectations does not qualify as "independent judgment" is inconsistent with the standards in *New Vista* because LPN2's unrebutted testimony is that they chose to do training instead of writing the CNAs up (JA000467-468). *New Vista* at 132 citing *Attleboro* at 165 ("has discretion to take different actions, including verbally counseling the misbehaving employee . . .").

There is also no dispute in the Record that LPN2 recommended the termination of a CNA (JA000388), which, while not imposed due to the Administrator's determination that there was insufficient documentation to support it, further confirms that actions taken by the LPNs under their authority as statutory supervisors had "a real potential to lead to an impact on employment."

Coral Harbor submits that the record, when viewed through the lens of all of the factors identified in *New Vista* and the industrial practicability principles

discussed above, establishes that the nurses meet the statute's requirements for effectively recommends discipline:

LPNs have the discretion to take different actions, including verbal counseling or more formal action; LPNs actions initiate the disciplinary process; and, the LPNs' actions function like discipline because their write ups become a permanent part of related personnel files and could lead to more severe consequences for future rule violations.

V. The questions of exceptional importance raised by the Panel Decision extend beyond this case given the NLRB's announced plan to use *New Vista* in a future reconsideration of extant Board law.

The NLRB's announced intention in *Mountain View* to reconsider extant Board law for statutory supervisor status based on "effectively recommend discipline" using this Court's concerns in *New Vista* and *Attleboro* gives this Court the opportunity to set the standard on a national basis and determine whether principles of industrial practicality necessary to balance management and labor interests in health care facilities across the county will prevail, affecting not only 15,600[1] nursing homes, but also all other workforce settings in which workers have the authority to effectively recommend discipline.

[1] Center for Disease Control and Prevention, National Center for Health Statistics, Nursing Home Care, https://cdc.gov/nchs/fastats/nursing-home-care.htm (Statistic as of 2016).

CONCLUSION

WHEREFORE, Coral Harbor requests this Honorable Court to GRANT its Petition for Rehearing En Banc; SET ASIDE the Board's decision in these matters; and, DENY the Board's Petition for Enforcement.

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CERTIFICATE OF COMPLIANCE

I, Louis J. Capozzi, Jr., Esquire, hereby certify to the following:

1. This brief contains 3895 words using Microsoft Word software.

2. The text of the electronic brief is identical to the text in the paper copies.

3. A virus detection program, Sophus Endpoint Security and Control, Version 10.0, has been run on the file and that no virus was detected.

4. Opposing counsel are Filing Users as provided in L.A.R. Misc. 113.4 and have consented to electronic service of the brief through the court's electronic docketing system (CM/ECF).

I also certify herein that on this 7th day of February 2020, I am also mailing to each of them via first class U.S. mail, postage pre-paid, a paper copy of the brief and attachments.

5. I am admitted to practice in this Court of Appeals.

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945 F.3d 763
United States Court of Appeals, Third Circuit.

CORAL HARBOR REHABILITATION AND NURSING CENTER, Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, Respondent
National Labor Relations Board, Petitioner
v.
Coral Harbor Rehabilitation and Nursing Center, Respondent

No. 18-2220, No. 18-2619
|
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Synopsis

Background: Employer, who had purchased a nursing home in which union represented two separate units of licensed practical nurses (LPNs) and certified nursing assistants (CNAs), petitioned for review of National Labor Relations Board's (NLRB) determination that it violated National Labor Relations Act (NLRA) by refusing to bargain with LPNs and unilaterally changed wages and benefits without notice to union. NLRB cross-petitioned for enforcement of its order.

[Holding:] The Court of Appeals, McKee, Circuit Judge, held that LPNs were not supervisors, but instead, statutory employees protected by the NLRA.

Petition for review denied and application for enforcement granted.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (13)

[1] **Labor and Employment**
Deference to Board

Court of Appeal's review of orders of the National Labor Relations Board (NLRB) is highly deferential.

[2] **Labor and Employment**
Questions of Law or Fact; Findings

Labor and Employment
Substantial evidence

Court of Appeals reviewing orders of the National Labor Relations Board (NLRB) accepts its factual findings if they are supported by substantial evidence and exercises plenary review over questions of law and the Board's application of legal precepts.

[3] **Labor and Employment**
Substantial evidence

"Substantial evidence," as will support order of the National Labor Relations Board (NLRB) upon judicial review, means relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

[4] **Labor and Employment**
Nature and scope of duty in general

Under NLRA, a new employer, succeeding to the business of another, has an obligation to bargain with the union representing the predecessor's employees. National Labor Relations Act § 8, 29 U.S.C.A. § 158(a)(5) & (1).

[5] **Labor and Employment**
Supervisory personnel

Under NLRA, a new employer, succeeding to the business of another, is not required to afford collective bargaining rights to supervisory employees. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[6] **Labor and Employment**
Particular Findings

Whether someone is a supervisor, and thus not protected under NLRA provisions regarding union representation, is a question of fact, which will be upheld upon judicial review if supported by substantial evidence. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[7] **Labor and Employment**
Particular issues in general

Burden to demonstrate that an employee is a supervisor, and thus not protected under NLRA provisions regarding union representation, is borne by party claiming that the employee is a supervisor. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[8] **Labor and Employment**
Supervisory personnel

Test for determining whether an individual is a supervisor, and thus not protected under NLRA provisions regarding union representation, requires analysis of whether: (1) they hold authority to engage in supervisory functions; (2) their exercise of such authority requires the use of independent judgment; and (3) their authority is held in the interest of the employer. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[9] **Labor and Employment**
Supervisory personnel

An employee exercises "independent judgment," as will support finding that she is a supervisor, and thus not protected under NLRA provisions regarding union representation, if she acts, or effectively recommends action, free of the control of others and forms an opinion or evaluation by discerning and comparing data. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[10] **Labor and Employment**
Supervisory personnel

An employee's judgment is not "independent," as required for a finding that she is a supervisor, and thus not protected under NLRA provisions regarding union representation, if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[11] **Labor and Employment**
Supervisory personnel

In order for an employee's judgment to be "independent," as will support finding that she is a supervisor, and thus not protected under NLRA provisions regarding union representation, it must involve a degree of discretion that rises above the routine or clerical. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[12] **Labor and Employment**
Supervisory personnel

For an employee's judgment to be "independent," as will support finding that she is a supervisor, and thus not protected under NLRA provisions regarding union representation, she must be vested with genuine management prerogatives. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

[13] **Labor and Employment**
Supervisory personnel

Licensed practical nurses (LPNs) at nursing home did not exercise independent judgment, as required to be supervisors exempt from protection under NLRA provision governing union representation; although LPNs issued disciplinary notices to certified nursing assistants (CNAs), all discipline was required to be cleared with the director of nursing or a manager,

who then investigated the matter, talked to the CNA, accessed the CNA's personnel file, and determined appropriate level of discipline.

National Labor Relations Act § 2, 29 U.S.C.A. § 152(3).

***764** On Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board (NLRB-1 No. 22-CA-167738)

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Before: McKEE, PORTER, and ROTH, Circuit Judges.

OPINION OF THE COURT

McKEE, Circuit Judge.

***765** Coral Harbor Rehabilitation and Nursing Center (the "Center") asks us to review the National Labor Relations Board's determination that the Center violated Sections 8(a)(5) and (1) of the National Labor Relations Act by (1) refusing to bargain with 1199 Service Employees International Union United Healthcare Workers East (the "Union") as the representative of the Center's licensed practical nurses ("LPNs") and (2) unilaterally changing their wages and benefits without notice to the Union or providing the Union an opportunity to bargain. [1] Because the Board's decision is consistent with precedent and supported by substantial evidence, we will deny the Center's petition for review and grant the Board's cross-application for enforcement.

I. BACKGROUND

The Center purchased a nursing home in which the Union represented two separate units of employees – a unit of LPNs and a unit of service employees that included certified nursing assistants ("CNAs"). [2] After the purchase, the Center hired a majority of the LPNs who had worked for the former employer, increased their wages, and changed their paid leave and health benefits, without making any effort to bargain the changes with the Union. Approximately 25 LPNs and 36 CNAs were ultimately employed by the Center.

After the Center changed the terms of the LPNs' employment, the Union filed charges of unfair labor practices, alleging that the Center had violated Sections 8(a)(5) and (1) of the NLRA by refusing to bargain with the Union as the representative of the LPNs, and by later making unilateral changes to their wages and benefits without notice to the Union or providing the Union an opportunity to bargain.

After an initial investigation, the Board's General Counsel filed a complaint of unfair labor practices against the Center. The Center responded that it was a *Burns* successor and therefore not under any obligation to recognize or bargain with the Union over the changes in the terms of the LPNs' employment because the LPNs had been converted into supervisors and were therefore exempt from the protections of the NLRA.

Thereafter, an administrative law judge conducted an evidentiary hearing at which four of the Center's LPNs, its Director of Nursing ("DON"), and its Administer testified about the activities and responsibilities of the LPNs. According to that testimony, the LPNs did not attend morning staff meetings with managers but did receive completed master schedules and could add or subtract CNAs on the schedule with permission from the DON. The ***766** LPNs were told that they would play an active role in supervising CNAs, would have the authority to exercise their independent judgment, were expected to discipline employees, and complete employee evaluations.

A section of the employee handbook entitled "Role of Licensed Professional Nurses (LPNs) and Registered Nurses (RNs)" stated: "RN and LPN Supervisors ... have the responsibility to issue discipline (oral and written warnings) to nursing assistants when they believe warranted. Discipline can be for matters relating to resident care or for violations of the employee rules of conduct under Coral Harbor's Progressive Disciplinary System." [3] A Notice of Disciplinary

Action ("disciplinary notice") is a form containing a narrative about an employee's infraction and the type of discipline issued, i.e., verbal warning or write-up.

Testimony offered by the LPNs at the hearing regarding specific instances of imposing discipline can be summarized as follows: LPN 1 testified that she has not personally disciplined anyone, but that she has signed and delivered disciplinary notices for two employees that were completed by the DON. The DON filled out the disciplinary notices and gave them to her to issue. In fact, according to LPN 1, she was not present when either employee committed their respective infractions.

LPN 2 testified that she twice imposed discipline against the same CNA—a verbal warning and a written discipline for re-education. However, like LPN 1, LPN 2 did not witness the infraction and did not have access to the personnel file of the CNA to know what "level" of discipline to administer. She was, however, instructed by the Administrator and DON on how to proceed in terms of discipline. The severity and ultimate approval of the discipline was left to the discretion of the DON.

LPN 3 testified that she would first have to get the disciplinary notice from the DON and consult with the DON or a supervisor [4] before disciplining anyone. When she wrote the narrative on the disciplinary notice for an employee, the verbal warning and approval of the discipline was determined by the DON. LPN 3 further testified that on two separate occasions she was asked to deliver a disciplinary notice to a CNA, but the notice itself had been filled out by a supervisor. On each of those occasions, her only role was the physical delivery of the notice.

Lastly, LPN 4 testified that she issued three disciplinary notices, without instruction or consultation and made formal recommendations, but the subsequent discipline was handled by the unit manager. However, LPN 4 also testified that for three other disciplinary notices she was simply asked for her signature on a notice that was already completed, or she was instructed to write up the notice for an infraction she had not observed.

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Based on the testimony, the ALJ found that the Center was a *Burns* successor and that it had hired a majority of its predecessor's employees. The ALJ thus concluded that the Center had an obligation to bargain with the union of its predecessor. The ALJ also found that the LPNs were not supervisors as defined by Section 2(11) of the NLRA but were instead, statutory employees protected by the NLRA and represented by the Union. Accordingly, the ALJ held that the Center violated Sections 8(a)(5) and (1) of the NLRA by refusing to recognize and bargain collectively with the Union, and by making unilateral changes to the wages and benefits of the LPNs without notice to the Union or giving it an opportunity to bargain over the changes.

The Center filed exceptions with the Board but limited its challenge to the ALJ's findings regarding the LPNs' role in discipline and adjusting grievances. The Board affirmed the ALJ's rulings and findings. The Board specifically concluded that the Center failed to establish that the LPNs (1) have supervisory authority to discipline or effectively recommended discipline or (2) possess the supervisory authority to adjust grievances.

Thereafter, the Center petitioned us to review the Board's decision, and the Board cross-petitioned for enforcement of its order. [5]

II. STANDARD OF REVIEW

[1] **[2]** **[3]** Our "review of orders of the Board is highly deferential." [6] "We accept the Board's factual findings if they are supported by substantial evidence ... [and] exercise plenary review over questions of law and the Board's application of legal precepts." [7] Substantial evidence "means relevant evidence that a reasonable mind might accept as adequate to support a conclusion." [8]

III. DISCUSSION

A. *NLRB v. Burns*

[4] In *NLRB v. Burns Int'l Sec. Servs., Inc.*, [9] the Supreme Court held that a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. It is therefore undisputed that as a successor-employer, the Center had the right to set the initial terms of employment for LPNs when it took over operations for the nursing home. Accordingly, "[a] new employer has a duty under § 8(a)(5) [of the NLRA] to bargain with the incumbent union that represented the predecessor's employees when there is a 'substantial continuity' between the predecessor and successor enterprises." [10] As the Court explained in *Burns*:

> ***768** Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [11]

Thus, under *Burns*, "the new employer, succeeding to the business of another, had an obligation to bargain with the union representing the predecessor's employees." [12]

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [13]

Section 8(a)(1) states: "[i]t shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights. [14] Section 8(a)(5) states: "[i]t shall be an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of [its] employees." [15]

[5] However, not all employees are included under the protective umbrella of the NLRA and collective bargaining. Employers are not required to afford collective bargaining rights to supervisory employees. [16] The Center concedes that it refused to bargain with the Union on behalf of the LPNs and that it unilaterally changed the LPNs' wages and benefits without notice to the Union and without providing the Union an opportunity to bargain. Therefore, resolution of this dispute turns on whether the LPNs were statutory supervisors under Section 2(11) of the NLRA.

B. *NLRB v. Kentucky River*

"To be entitled to the [NLRA's] protections and includable in a bargaining unit, one must be an 'employee' as defined by the [NLRA]." [17] The NLRA states that the term "employee" includes:

> any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but **shall not include** any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or **any individual employed as a supervisor**, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any ***769** other person who is not an employer as herein defined. [18]

Thus, the NLRA excludes supervisors from the definition of "employee." "Supervisor" is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [19]

Supervisors are not protected under the NLRA provisions that protect employees, and supervisors are not included in a bargaining unit. [20]

[6] **[7]** "Whether someone is a supervisor is a question of fact, and thus will be upheld if ... supported by substantial evidence." [21] In *Kentucky River*, the Supreme Court decided "which party in an unfair-labor-practice proceeding bears the burden of proving or disproving an employee's supervisory status; and whether judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience." [22] The Court acknowledged that the NLRA does not "expressly allocate the burden of proving or disproving a challenged employee's supervisory status." [23] The Board "has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor." [24]

As the party claiming supervisory status, the Center bears the burden of establishing it here. [25] Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board's expertise and therefore subject to limited judicial review. [26] We must uphold the Board's supervisory-status conclusion as long as it is supported by substantial evidence, "even if we would have made a contrary determination had the matter been before us *de novo*." [27]

[8] In *Kentucky River*, the Court established the following three-part test for determining whether an individual is a supervisor:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions [in Section 2(11)], (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. [28]

The Center alleges that the LPNs were supervisors under the NLRA because they had authority to discipline or effectively recommend discipline of CNAs. We disagree.

***770** **[9]** **[10]** **[11]** **[12]** It is clear under *Kentucky River* that our inquiry here must focus on whether the LPNs have "use of independent judgment" to impose discipline. [29] A person exercises independent judgment if she "act[s], or effectively recommend[s] action, free of the control of others and form[s] an opinion or evaluation by discerning and comparing data." [30] Judgment is not independent if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." [31] Moreover, in order for judgment to be independent, it "must involve a degree of discretion that rises above the 'routine or clerical.' " [32] This standard seeks to distinguish "between straw bosses, leadmen, set-up men, and other minor supervisory employees," who are included within the NLRA's protections, "and the supervisor vested with such genuine management prerogatives as" those established under Section 2(11). [33]

[13] This record supports the Board's conclusion that the Center's LPNs lacked independent judgment as required under Section 2(11). The Board agreed with the ALJ's findings that "[a]ll discipline must be cleared with the DON or manager and the DON or manager must approve all recommendations of discipline of employees." [34] While the four LPNs who testified stated that they issued disciplinary

notices to CNAs, they all also testified that they did not fill out the level or type of discipline on the disciplinary notices. Instead, that section of the notice was left open to be "signed off" and imposed by the DON.

Moreover, the LPNs did not have access to employee personnel files and therefore could not know what level of discipline was appropriate in any given case. Rather, it was the DON who filled out disciplinary notices herself or received notices from an LPN, investigated the matter, talked to the CNA, and determined the appropriate level of discipline. Accordingly, it can hardly be said that the LPNs were responsible for administering discipline to the extent required for supervisory status under the NLRA.

Furthermore, it is unclear whether there are established policies that control whether a verbal warning will be issued for a given infraction as opposed to a written one or whether there is some form of incremental discipline. "Under its written disciplinary policy, [the Center] retains discretion to impose whatever level of discipline it determines is appropriate, and the disciplinary notices in the record do not follow any defined progression." [35] However, it is clear that LPNs cannot exercise independent discretion to decide the level of discipline that will be imposed.

The Board agreed with the ALJ's conclusion that: (1) LPNs do not have the authority to assign or the responsibility to direct CNAs with use of independent judgment; (2) LPNs do not have authority to discipline CNAs and others; (3) the evaluations of CNAs are not determinative of ***771** LPN supervisory status; and (4) LPNs do not have accountability nor authority to responsibly direct. [36]

C. *NLRB v. New Vista Nursing*

The Center further argues that under our decision in *NLRB v. New Vista Nursing and Rehabilitation*, the NLRA does not preclude an LPN from having supervisory authority merely because her recommendation is subject to a superior's investigation. [37] In *New Vista*, we identified two considerations which do not negate supervisory status: "(1) whether a nurse's supervisor undertakes an independent investigation; and (2) whether the employees exercise their supervisory authority only a few times (or even just one time)." [38] We also recognized that three factors – considered in the aggregate – may establish that an individual is a statutory supervisor: "(1) the [individual] has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action; (2) the [individual's] actions 'initiate' the disciplinary process; and (3) the [individual's] action functions like discipline because it increases severity of the consequences of a future rule violation." [39]

Here, after the Board decided that the ALJ's conclusion was consistent with *Kentucky River*, it specifically cited to our decision in *New Vista*, explaining that "the same result would obtain under the standards employed by the United States Court of Appeals for the Third Circuit [in *New Vista Nursing*]." [40] We agree.

Notwithstanding the Center's reliance on *New Vista*, it is clear that the LPNs here lacked discretion to impose discipline. The Board found, "[i]n every instance where an LPN-witness was questioned about a specific disciplinary notice, the witness testified, without contradiction, that a manager had instructed the LPN to fill out and sign the disciplinary notice, had actually filled out the disciplinary notice and simply instructed the LPN to sign it, or had brought a CNA's infraction to the LPN's attention and suggested that a disciplinary notice was warranted." [41] It is clear that the Center's LPNs do not have "discretion to take different actions," [42] unless instructed by a manager.

The Center has failed to carry its burden and did not establish that the LPNs "initiate a progressive disciplinary process" [43] or that such a process even exists. Nowhere in the Center's brief does it offer an explanation of how any of its disciplinary actions follow a progressive disciplinary policy "and the disciplinary notices in the record do not follow any defined progression." [44] And because the LPNs lacked access to CNA personnel files, they could not determine appropriate levels of discipline. The LPNs' inability to determine ***772** which level of discipline was appropriate demonstrates that there was a clear lack of "supervisor" training for LPNs and their actions did not "initiate a progressive disciplinary process." [45]

Lastly, the Center has not established that an LPN's involvement with disciplinary notices "increases severity of the consequences of a future rule violation." [46] As we have explained, unit managers, the ADON, or the DON impose the level of discipline they deem to be appropriate at any given time. There is also evidence of individual CNAs receiving the same level of discipline for multiple infractions. Nowhere

does the record establish that a subsequent infraction increased the severity of discipline after an LPN was involved in issuing a prior disciplinary notice.

IV.

For the reasons set forth above, we conclude that substantial evidence supports the Board's determination that the LPNs were not statutory supervisors and they were therefore not excluded from the NLRA's protections. Accordingly, the Center had an obligation to inform the Union of the changes it made in the LPNs' duties and to refrain from making those changes in the absence of bargaining with the Union. We will therefore deny the Center's petition for review and grant the Board's cross-application for enforcement.

All Citations

945 F.3d 763, 2019 L.R.R.M. (BNA) 493,560

Footnotes

1 29 U.S.C. § 158(a)(5) & (1).

2 LPNs at the Center distribute medication, provide treatments, and ensure that the needs of residents are met. CNAs provide basic care to residents and assist with daily living functions, such as feeding, grooming, dressing, walking, hygiene, and bathing.

3 JA-1224.

4 LPN 3's use of the term "supervisor" during her testimony referred to either a unit manager or the assistant DON ("ADON"), but never an LPN.

5 The Board possessed jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the NLRA. 29 U.S.C. § 160(a). We have jurisdiction pursuant to Section 10(e) and (f) of the NLRA. 29 U.S.C. § 160(e), (f).

6 *Trimm Assocs., Inc. v. NLRB*, 351 F.3d 99, 102 (3d Cir. 2003).

7 *Spectacor Mgmt. Grp. v. NLRB*, 320 F.3d 385, 390 (3d Cir. 2003); *see Adv. Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016).

8 *NLRB v. ImageFIRST Unif. Rental Serv., Inc.*, 910 F.3d 725, 732 (3d Cir. 2018).

9 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972).

10 *Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987)).

11 *Burns*, 406 U.S. at 294–95, 92 S.Ct. 1571.

12 *Fall River Dyeing*, 482 U.S. at 29, 107 S.Ct. 2225 (citing *Burns*, 406 U.S. at 278–79, 92 S.Ct. 1571).

13 29 U.S.C. § 157.

14 29 U.S.C. § 158(a)(1).

15 29 U.S.C. § 158(a)(5).

16 *See* 29 U.S.C. § 152(3).

17 *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011) (citing 29 U.S.C. § 152(3); *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001)).

18 29 U.S.C. § 152(3) (emphasis added).

19 29 U.S.C. § 152(11).

20 *See* 29 U.S.C. § 152(3).

21 *Mars Home*, 666 F.3d at 853.

22 532 U.S. at 708, 121 S.Ct. 1861.

23 *Id.* at 710, 121 S.Ct. 1861.

24 *Id.* at 710–11, 121 S.Ct. 1861.

25 *Mars Home*, 666 F.3d at 854.

26 *Id.* at 853.

27 *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

28 532 U.S. at 713, 121 S.Ct. 1861 (internal quotation marks and citations omitted).

29 *Id.*

30 *In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006).

31 *Id.*

32 *Id.*

33 *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 280–81, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) (citing S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

34 JA-22.

35 *Coral Harbor Rehab. & Nursing Ctr. & 1199 SEIU United Healthcare Workers E.*, 366 NLRB No. 75, *1 n.6 (May 2, 2008).

36 Under the third prong of our *Kentucky River* inquiry we determine whether the authority of the alleged supervisors is held in the interest of the employer; however, since we conclude that the Board correctly ruled that the Center's LPNs are not statutory supervisors under prongs one or two, we need not reach prong three. *See* 532 U.S. at 713, 121 S.Ct. 1861.

37 870 F.3d 113, 132–33 (3d Cir. 2017).

38 *Id.* (internal quotation marks and citations omitted).

39 *Id.* at 132.

40 366 NLRB at *1 n.6.

41 *Id.*

42 *New Vista*, 870 F.3d at 132.

43 *Id.* at 136.

44 *Coral Harbor*, 366 NLRB at *1 n.6.

45 *New Vista*, 870 F.3d at 132.

46 *Id.* at 136.

UNITED STATES COURT OF APPEALS
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No. 18-2220

CORAL HARBOR REHABILITATION AND NURSING CENTER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 18-2619

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

CORAL HARBOR REHABILITATION AND NURSING CENTER,
Respondent

On Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board
(NLRB-1 No. 22-CA-167738)

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 11, 2019

Before: McKEE, PORTER, and ROTH, *Circuit Judges*.

JUDGMENT

This case came to be heard on the record from the National Labor Relations Board and was submitted on March 11, 2019.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the petition for review is DENIED and the cross-application to enforce the National Labor Relations Board's order is GRANTED. All of the above in accordance with the Opinion of this Court.

Costs taxed against Coral Harbor Rehabilitation and Nursing Center.

ATTEST:

Patricia S. Dodszuweit
Clerk

DATED: December 26, 2019

PRECEDENTIAL

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OPINION OF THE COURT

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Coral Harbor Rehabilitation and Nursing Center (the "Center") asks us to review the National Labor Relations Board's determination that the Center violated Sections 8(a)(5) and (1) of the National Labor Relations Act by (1) refusing to bargain with 1199 Service Employees International Union United Healthcare Workers East (the "Union") as the representative of the Center's licensed practical nurses ("LPNs") and (2) unilaterally changing their wages and benefits without notice to the Union or providing the Union an opportunity to bargain.[1] Because the Board's decision is consistent with precedent and supported by substantial evidence, we will deny the Center's petition for review and grant the Board's cross-application for enforcement.

[1] 29 U.S.C. § 158(a)(5) & (1).

I. BACKGROUND

The Center purchased a nursing home in which the Union represented two separate units of employees – a unit of LPNs and a unit of service employees that included certified nursing assistants ("CNAs").[2] After the purchase, the Center hired a majority of the LPNs who had worked for the former employer, increased their wages, and changed their paid leave and health benefits, without making any effort to bargain the changes with the Union. Approximately 25 LPNs and 36 CNAs were ultimately employed by the Center.

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In *NLRB v. Burns Int'l Sec. Servs., Inc.*,[9] the Supreme

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[5] The Board possessed jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the NLRA. 29 U.S.C. § 160(a). We have jurisdiction pursuant to Section 10(e) and (f) of the NLRA. 29 U.S.C. § 160(e), (f).

[6] *Trimm Assocs., Inc. v. NLRB*, 351 F.3d 99, 102 (3d Cir. 2003).

[7] *Spectacor Mgmt. Grp. v. NLRB*, 320 F.3d 385, 390 (3d Cir. 2003); *see Adv. Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016).

[8] *NLRB v. ImageFIRST Unif. Rental Serv., Inc.*, 910 F.3d 725, 732 (3d Cir. 2018).

[9] 406 U.S. 272 (1972).

Court held that a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. It is therefore undisputed that as a successor-employer, the Center had the right to set the initial terms of employment for LPNs when it took over operations for the nursing home. Accordingly, "[a] new employer has a duty under §8(a)(5) [of the NLRA] to bargain with the incumbent union that represented the predecessor's employees when there is a 'substantial continuity' between the predecessor and successor enterprises."[10] As the Court explained in *Burns*:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.[11]

Thus, under *Burns*, "the new employer, succeeding to the business of another, had an obligation to bargain with the union representing the predecessor's employees."[12]

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13]

Section 8(a)(1) states: "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.[14] Section 8(a)(5) states: "[i]t shall be an unfair labor practice for

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[10] *Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)).

[11] *Burns*, 406 U.S. at 294–95.

[12] *Fall River Dyeing*, 482 U.S. at 29 (citing *Burns*, 406 U.S. at 278–79).

[13] 29 U.S.C. § 157.

[14] 29 U.S.C. § 158(a)(1).

an employer . . . to refuse to bargain collectively with the representatives of [its] employees."[15]

However, not all employees are included under the protective umbrella of the NLRA and collective bargaining. Employers are not required to afford collective bargaining rights to supervisory employees.[16] The Center concedes that it refused to bargain with the Union on behalf of the LPNs and that it unilaterally changed the LPNs' wages and benefits without notice to the Union and without providing the Union an opportunity to bargain. Therefore, resolution of this dispute turns on whether the LPNs were statutory supervisors under Section 2(11) of the NLRA.

B. ***NLRB v. Kentucky River***

"To be entitled to the [NLRA's] protections and includable in a bargaining unit, one must be an 'employee' as defined by the [NLRA]."[17] The NLRA states that the term "employee" includes:

> any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but **shall not include** any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or **any individual employed as a supervisor**, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an

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[15] 29 U.S.C. § 158(a)(5).

[16] *See* 29 U.S.C. § 152(3).

[17] *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011) (citing 29 U.S.C. § 152(3); *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001)).

> employer as herein defined.[18]

Thus, the NLRA excludes supervisors from the definition of "employee." "Supervisor" is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[19]

Supervisors are not protected under the NLRA provisions that protect employees, and supervisors are not included in a bargaining unit.[20]

"Whether someone is a supervisor is a question of fact, and thus will be upheld if . . . supported by substantial evidence."[21] In *Kentucky River*, the Supreme Court decided "which party in an unfair-labor-practice proceeding bears the burden of proving or disproving an employee's supervisory status; and whether judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience."[22] The Court acknowledged that the NLRA does not "expressly allocate the burden of proving or disproving a challenged employee's supervisory status."[23] The Board "has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor."[24]

As the party claiming supervisory status, the Center

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[18] 29 U.S.C. § 152(3) (emphasis added).
[19] 29 U.S.C. § 152(11).
[20] *See* 29 U.S.C. § 152(3).
[21] *Mars Home*, 666 F.3d at 853.
[22] 532 U.S. at 708.
[23] *Id.* at 710.
[24] *Id.* at 710–11.

bears the burden of establishing it here.[25] Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board's expertise and therefore subject to limited judicial review.[26] We must uphold the Board's supervisory-status conclusion as long as it is supported by substantial evidence, "even if we would have made a contrary determination had the matter been before us *de novo*."[27]

In *Kentucky River*, the Court established the following three-part test for determining whether an individual is a supervisor:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions [in Section 2(11)], (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.[28]

The Center alleges that the LPNs were supervisors under the NLRA because they had authority to discipline or effectively recommend discipline of CNAs. We disagree.

It is clear under *Kentucky River* that our inquiry here must focus on whether the LPNs have "use of independent judgment" to impose discipline.[29] A person exercises independent judgment if she "act[s], or effectively recommend[s] action, free of the control of others and form[s] an opinion or evaluation by discerning and comparing data."[30] Judgment is not independent if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the

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[25] *Mars Home*, 666 F.3d at 854.
[26] *Id.* at 853.
[27] *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).
[28] 532 U.S. at 713 (internal quotation marks and citations omitted).
[29] *Id.*
[30] *In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 693 (2006).

provisions of a collective bargaining agreement."[31] Moreover, in order for judgment to be independent, it "must involve a degree of discretion that rises above the 'routine or clerical.'"[32] This standard seeks to distinguish "between straw bosses, leadmen, set-up men, and other minor supervisory employees," who are included within the NLRA's protections, "and the supervisor vested with such genuine management prerogatives as" those established under Section 2(11).[33]

This record supports the Board's conclusion that the Center's LPNs lacked independent judgment as required under Section 2(11). The Board agreed with the ALJ's findings that "[a]ll discipline must be cleared with the DON or manager and the DON or manager must approve all recommendations of discipline of employees."[34] While the four LPNs who testified stated that they issued disciplinary notices to CNAs, they all also testified that they did not fill out the level or type of discipline on the disciplinary notices. Instead, that section of the notice was left open to be "signed off" and imposed by the DON.

Moreover, the LPNs did not have access to employee personnel files and therefore could not know what level of discipline was appropriate in any given case. Rather, it was the DON who filled out disciplinary notices herself or received notices from an LPN, investigated the matter, talked to the CNA, and determined the appropriate level of discipline. Accordingly, it can hardly be said that the LPNs were responsible for administering discipline to the extent required for supervisory status under the NLRA.

Furthermore, it is unclear whether there are established policies that control whether a verbal warning will be issued for a given infraction as opposed to a written one or whether there is some form of incremental discipline. "Under its written disciplinary policy, [the Center] retains discretion to

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[31] *Id.*

[32] *Id.*

[33] *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 280–81 (1974) (citing S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

[34] JA-22.

impose whatever level of discipline it determines is appropriate, and the disciplinary notices in the record do not follow any defined progression."[35] However, it is clear that LPNs cannot exercise independent discretion to decide the level of discipline that will be imposed.

The Board agreed with the ALJ's conclusion that: (1) LPNs do not have the authority to assign or the responsibility to direct CNAs with use of independent judgment; (2) LPNs do not have authority to discipline CNAs and others; (3) the evaluations of CNAs are not determinative of LPN supervisory status; and (4) LPNs do not have accountability nor authority to responsibly direct.[36]

C. *NLRB v. Vista Nursing*

The Center further argues that under our decision in *NLRB v. New Vista Nursing and Rehabilitation*, the NLRA does not preclude an LPN from having supervisory authority merely because her recommendation is subject to a superior's investigation.[37] In *New Vista*, we identified two considerations which do not negate supervisory status: "(1) whether a nurse's supervisor undertakes an independent investigation; and (2) whether the employees exercise their supervisory authority only a few times (or even just one time)."[38] We also recognized that three factors – considered in the aggregate – may establish that an individual is a statutory supervisor: "(1) the [individual] has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action; (2) the [individual's] actions 'initiate' the disciplinary process; and (3) the [individual's] action functions like discipline because it increases severity of the consequences of

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[35] *Coral Harbor Rehab. & Nursing Ctr. & 1199 SEIU United Healthcare Workers E.*, 366 NLRB No. 75, *1 n.6 (May 2, 2008).

[36] Under the third prong of our *Kentucky River* inquiry we determine whether the authority of the alleged supervisors is held in the interest of the employer; however, since we conclude that the Board correctly ruled that the Center's LPNs are not statutory supervisors under prongs one or two, we need not reach prong three. *See* 532 U.S. at 713.

[37] 870 F.3d 113, 132–33 (3d Cir. 2017).

[38] *Id.* (internal quotation marks and citations omitted).

a future rule violation."[39]

Here, after the Board decided that the ALJ's conclusion was consistent with *Kentucky River*, it specifically cited to our decision in *New Vista*, explaining that "the same result would obtain under the standards employed by the United States Court of Appeals for the Third Circuit [in *New Vista Nursing*]."[40] We agree.

Notwithstanding the Center's reliance on *New Vista*, it is clear that the LPNs here lacked discretion to impose discipline. The Board found, "[i]n every instance where an LPN-witness was questioned about a specific disciplinary notice, the witness testified, without contradiction, that a manager had instructed the LPN to fill out and sign the disciplinary notice, had actually filled out the disciplinary notice and simply instructed the LPN to sign it, or had brought a CNA's infraction to the LPN's attention and suggested that a disciplinary notice was warranted."[41] It is clear that the Center's LPNs do not have "discretion to take different actions,"[42] unless instructed by a manager.

The Center has failed to carry its burden and did not establish that the LPNs "initiate a progressive disciplinary process"[43] or that such a process even exists. Nowhere in the Center's brief does it offer an explanation of how any of its disciplinary actions follow a progressive disciplinary policy "and the disciplinary notices in the record do not follow any defined progression."[44] And because the LPNs lacked access to CNA personnel files, they could not determine appropriate levels of discipline. The LPNs' inability to determine which level of discipline was appropriate demonstrates that there was a clear lack of "supervisor" training for LPNs and their actions did not "initiate a progressive disciplinary process."[45]

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[39] *Id.* at 132.
[40] 366 NLRB at *1 n.6.
[41] *Id.*
[42] *New Vista*, 870 F.3d at 132.
[43] *Id.* at 136.
[44] *Coral Harbor*, 366 NLRB at *1 n.6.
[45] *New Vista*, 870 F.3d at 132.

Lastly, the Center has not established that an LPN's involvement with disciplinary notices "increases severity of the consequences of a future rule violation."[46] As we have explained, unit managers, the ADON, or the DON impose the level of discipline they deem to be appropriate at any given time. There is also evidence of individual CNAs receiving the same level of discipline for multiple infractions. Nowhere does the record establish that a subsequent infraction increased the severity of discipline after an LPN was involved in issuing a prior disciplinary notice.

IV.

For the reasons set forth above, we conclude that substantial evidence supports the Board's determination that the LPNs were not statutory supervisors and they were therefore not excluded from the NLRA's protections. Accordingly, the Center had an obligation to inform the Union of the changes it made in the LPNs' duties and to refrain from making those changes in the absence of bargaining with the Union. We will therefore deny the Center's petition for review and grant the Board's cross-application for enforcement.

[46] *Id.* at 136.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-2220

CORAL HARBOR REHABILITATION AND NURSING CENTER,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

No. 18-2619

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

CORAL HARBOR REHABILITATION AND NURSING CENTER,

Respondent

(NLRB-1 No. 22-CA-167738)

Present: McKEE, PORTER and ROTH, Circuit Judges

1. Letter Motion by Intervenor-Respondent at No. 18-2220, 1199 SEIU United Healthcare Workers East, to Correct the Court's Opinion Entered on December 26, 2019.

Respectfully,
Clerk/slc

ORDER

The foregoing Motion is Granted.

The opinion is to be amended as follows:

Counsel for Intervenor, 1199 SEIU United Healthcare Workers East ("the Union") Jessica E. Harris, Esq., should be added.

Page 12 delete *NLRB v. Vista Nursing*, and replace with *NLRB v. New Vista Nursing*.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: January 6, 2020
SLC/cc: Counsel of Record

CERTIFICATE OF SERVICE

I, Louis J. Capozzi, Jr., attorney for CORAL HARBOR, hereby certify that on this date a copy of the foregoing document was served via the Court's electronic filing system to the following individuals which constitutes service on all parties or their counsel of record.

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